Indiana Gas Company, Inc. *and* International Brotherhood of Electrical Workers Local Union 1393, a/w International Brotherhood Electrical Workers, AFL-CIO *and* Darlene Notter. Cases 25–CA–25438 and 25–CA–25674

May 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On August 28, 1998, Administrative Law Judge Marion C. Ladwig issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

We find merit in the General Counsel's exception to the judge's failure to find that the Respondent violated Section 8(a)(1) of the Act when it told an employee that it could no longer trust union employees.

In spring 1997, the Respondent's field supervisor, John Friend, and operations manager, John Burke, began meeting with employees Darlene Notter and Ricardo Riggs about the possibility of creating another meter reader position. Friend told them not to discuss the new position with anyone and that if Union Steward Walters learned about it, they could lose their jobs. In April 1997, Burke, after speaking to Riggs and employee, David Ferguson about the new position, said that if they revealed anything to Walters, Burke would deny the conversation and Riggs could be bumped from his meter reader position.

When Walters learned of the new position from Ferguson, Walters spoke to Notter and Riggs, who confirmed what Walters had heard. Afterward, Burke and Friend met again with Riggs. Burke said that he could not trust any of the union employees anymore and that he was upset. Burke asked Riggs if he wanted to be a locator.[3] Friend then asked if Riggs wanted to remain a meter reader. When Riggs said yes, Friend replied that Riggs could be bumped.

The judge correctly found that the Respondent violated Section 8(a)(1) when Friend warned Notter and Riggs that if they told the union steward about the new meter reader position, they could lose their jobs, and when Burke told Riggs and Ferguson that if they told the union steward about the new position, Riggs could be bumped from his meter reader job.[4] However, the judge failed to address the complaint allegation that Burke's later statement to Riggs that Burke could not trust union employees also violated the Act.

By stating that he could not trust union employees anymore, Burke clearly expressed his displeasure with Riggs for engaging in union activity by informing the union steward about the conversations with management concerning the new meter reader position. The statement was followed immediately by implied threats of demotion for engaging in that activity.[5] Together, these comments certainly conveyed the message that the employees' union activity was tantamount to disloyalty to Burke, for which there could be adverse consequences. Under the circumstances, we agree with the General Counsel that Burke's statement that he could not trust union employees anymore because they revealed job-related information to their union steward would reasonably tend to restrain and coerce employees from engaging in further union activities in violation of Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Indiana Gas Company, Inc., Danville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(b) and (c).

"(b) Telling employees that it could not trust union employees because the employees revealed to their union steward information it gave them about their jobs.

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge inadvertently included broad injunctive language in his recommended Order, although he properly used narrow language in his notice. We shall modify the recommended Order to conform to the notice in this respect.

[3] A locator position would be a demotion for Riggs.

[4] The Respondent has not excepted to the findings of those violations.

[5] See *L'Ermitage Hotel*, 268 NLRB 744, 749 (1984), enfd. sub nom. *Ashkenazy Property Management Corp. v. NLRB*, 796 F.2d 479 (9th Cir. 1986).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with the loss or transfer of jobs if you reveal to the union steward or representative information the Company gives you about your jobs.

WE WILL NOT tell you that we cannot trust union employees because you reveal to your union steward information we gave you about your jobs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

INDIANA GAS COMPANY, INC.

Michael T. Beck, Esq., for the General Counsel.
Douglas J. Heckler, Esq. (Barnes & Thornburg), of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on June 1–2, 1998. The charges were filed June 12 and October 9, 1997,[1] and the consolidated complaint was issued December 3.

The primary issues are whether the Company, the Respondent (a) unlawfully threatened employees with loss or transfer of jobs if they engaged in protected concerted activity and (b) discriminatorily discharged Union Steward Gary Walters and employee Darlene Notter because of their union activity, violating Section 8(a)(1) and (3) of the National Labor Relations Act.(the Act)

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Company, I make the following

[1] All dates are in 1997 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is a public utility that generates and distributes gas in central and southern Indiana, where it annually derived over $250,000 in gross revenue and receives goods valued over $50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the International Brotherhood of Electrical Workers Local 1393, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Alleged Threats

The Company, a public utility distributing gas at 28 locations in Indiana, admittedly is "in a process of not hiring," relying on attrition and other separations to decrease the size of the work force to the "right levels" (Tr. 9–10, 176). This enables the Company to contract out more of the work under the union agreement, which provides (R. Exh. 2, art. 6, Contracting, 3):

> The Company agrees that it will not contract any work which is ordinarily done by its union employees if, as a result thereof, it would become necessary to lay off any employee, prevent the recall of any employee or lay off or to reduce the rate of pay of any union employee.

In the spring 1997, when the two meter reader routes at the Danville facility were being divided into three routes, the Company began assigning the union steward, fitter Gary Walters, and another fitter to work in the lower meter reader classification, along with meter readers Darlene Notter and Ricardo Riggs (Tr. 27, 68). Walters filed a grievance, alleging a violation of the agreement (Tr. 183, 193–195, 375–376; R. Exh. 13). In a grievance meeting with Employee Relations Director James Hobson, as Walters credibly testified (Tr. 184):

> I was saying because they was contracting out my job and this other fitter's job and having us read the meters and then they was doing away with [the fitter] job, they in effect was violating [the contracting provision] of the contract.
>
> . . . .
>
> I said union or no-union I will get a lawyer, you cannot do it according to what that contract said and [Hobson] said that he wasn't scared of lawyers.

Meanwhile the Company had closed its operation of the materials distribution center in Indianapolis. Two of the replaced employees exercised their bumping rights under the union agreement and replaced two Danville employees. One of them replaced a Danville material distribution specialist, who in turn replaced an employee at the Company's Lebanon location. The other one replaced meter reader Riggs, who replaced David Ferguson, the Danville line locator. Ferguson was given the choice of replacing an employee at another location or taking a buy out, which included an additional $5000. (Tr. 25, 49, 138, 184–185, 325; R. Exh. 2, art. 12, Layoff, sec. 1, 6.)

In apparent response to Walters' grievance (Tr. 186), the Company began planning to add another meter reader job in

Danville. It permitted both Riggs and Ferguson in the meantime to continue working on their previous meter reader and locator jobs. (Tr. 25–26, 53.) It endeavored, however, to conceal from Union Steward Walters its plans, which if carried out would enable Riggs to become the third meter reader and Ferguson to remain as locator.

Danville Field Supervisor Howard Friend met with meter readers Notter and Riggs and discussed the third meter reading route. It is undisputed (as Notter credibly testified) that Friend told them not to tell Union Steward Walters anything, warning that if they did, "there was a possibility we would lose our jobs too" (Tr. 68–70).

Area Manager John Burke later met with Riggs, Ferguson, and Friend. He discussed keeping Riggs and Ferguson as a meter reader and locator. He told them not to tell anybody, not even the union steward, about this meeting and warned (as Riggs credibly testified) that "if we told anybody that he would deny it" and "I would bump Dave and Dave would have the option of going to a different location or the buy-out." (Tr. 139–140.)

Burke testified that he and Friend met with Riggs and Ferguson and reported that they "were in the process of getting permission to hire a third meter reader" but that their request for another meter reader was "still up in the air." Burke admitted stating that "if the word got out and caused us not to hire the third meter reader, that we would just have to let the bumping process take its route and that it would be out of our hands at that time." He also admitted telling Riggs and Ferguson "not to tell anyone" and testified, "I don't know if we said union specifically." (Tr. 51–54.)

Employee Relations Director Hobson explained why the Company made Ferguson a buy-out offer of an additional $5000, which was not provided for in the union agreement. He admitted that his goal was "that we could continue to subcontract our material delivery [at the Indianapolis materials distribution center] without violating the subcontracting provision of our labor agreement" and "my goal was to make sure that everybody was accommodated that wanted to be accommodated" (Tr. 377, 380). He also admitted that subcontracting to his knowledge had been an issue since 1971 (Tr. 383).

Sometime in April, as Walters credibly testified, David Ferguson came to him and reported that Burke and Friend had been calling him and Riggs into meetings (Tr. 188):

> Dave stated to me that he asked for me to be in there with him and was denied it. They said no this is not a discipline meeting, you do not have to have your union steward in here, this was between us. Now we are trying to get it to where we can open the third [meter reader route] book but if your union steward finds out about it we will have to go by the contract and we can't open that up and you will both be without a job.

Walters spoke to meter readers Riggs and Notter, both of whom verified "what had been happening" (Tr. 188).

Walters (who impressed me most favorably as a truthful witness when testifying under oath) also credibly testified that the next time he heard from Ferguson was Friday, May 2, when Ferguson came to him, said "this is my deadline" and asked "What do I do?" Walters answered that "if you don't meet the deadline they probably won't give you the buy-out" and "you need to call Hobson today." Ferguson called Hobson, but no one answered. (Tr. 187.)

Ferguson again asked what to do, and Walters advised him to talk to Area Manager Burke and find out if they were going to open the third meter reader route so Riggs "can stay a meter reader and you can stay a locator. . . . don't miss your deadline because then you will have nothing. At least this way you are going to have $5000 for the buy-out." (Tr. 187.)

Ferguson spoke to Burke, who had no information for him—although Burke admitted at the trial that he had received word "sometime around late to mid-April" that the third meter reader route had been approved. Ferguson gave Burke his keys and his pager and put the buy-out agreement in the company mail to Hobson. (Tr. 24, 187.)

I discredit Hobson's claim that he had already told Ferguson before May 2 that the third meter reader job had been approved and that Ferguson stated his preference was to take the buy out instead of staying on the locator job (Tr. 379–382). I note that Hobson's April 24 letter to Ferguson, regarding the offered "severance" agreement, makes no reference to Hobson's telling Ferguson that the third route was being added in Danville (Tr. 390; R. Exh. 14).

On Tuesday, May 6, Walters complained to Assistant Business Agent Tim Eason and the union attorney about the conduct of the Company's supervisors in Danville, concealing information from him. They called Hobson on the speaker phone. When Hobson responded that Walters "should know that Rick Riggs has been called back," Walters said, "I don't know anything about that" and "now Rick is called back and Dave [Ferguson] took the buy-out, Dave's job isn't saved, he is gone." As Walters credibly testified, Hobson responded: "Well, I told John [Burke] and Howard [Friend] last week" and "if they don't tell you guys, that isn't my problem." Hobson added that Ferguson "took the buy-out, there isn't much I can do about it now." (Tr. 190–191.)

Thus, by concealing the information from Union Steward Walters that the Company had approved the third meter reader route in Danville, the Company had succeeded in eliminating another employee from the payroll, further downsizing the bargaining unit and enabling it to contract out more work. Particularly under these circumstance I find that the Company unlawfully threatened employees with loss or transfer of jobs if they engaged in protected concerted activity (1) when Field Supervisor Friend warned meter readers Notter and Riggs that if they told the union steward about the third meter reading route, "there was a possibility" they would lose their jobs and (2) when Area Manager Burke told Riggs and locator Ferguson that if they told the union steward about his meeting with them, Riggs' bumping of Ferguson from the locator job would proceed—coercing the employees in violation of Section 8(a)(1).

B. Discharge of Gary Walters and Darlene Notter

1. Possession of company property

On Friday morning, May 23, after the employees left the Danville facility for their day's work, a contractor came to pick up some pipe. Field Supervisor Howard Friend saw Darlene Notter's Bravada sport utility vehicle parked in front of the stacks of pipe. When he checked to determine if she left the keys in the vehicle, he saw in plain sight an unopened bag of the Company's grass seed on the floor board of the back seat. (Tr. 222, 238, 396; R. Exh. 10.)

Gary Walkers' pickup truck was parked, facing Notter's vehicle. In the back of the truck Friend saw another bag of grass seed through large air holes in a dog box. Upon opening the

box, he and Project Coordinator Jeff Autrie observed the bag leaning against the left side of the box. As shown in the video tape that Autrie made of the bag in each of the vehicles (R. Exh. 10), the top end of the bag, touching the side of the box was rolled down several inches, showing that the bag had been opened and part of the seed had been removed, leaving only a partial bag. (Tr. 221–223, 338–341, 344, 396–397; R. Exh. 10.)

The following Tuesday, May 27, the Company held a factfinding meeting with Notter, with William Kelsey as her witness in the absence of Union Steward Walters. As shown in Employee Relations Representative Chris Jernigan's notes (G.C. Exh. 5), which appear to be the most accurate account of what was said in the meetings, Notter claimed (p. 2) in the meeting that she had only a half bag of grass seed, which she planned to give to a customer and not use herself. She gave (pp. 3–4) his name as Rick (McDuffee), on Kimberly in Plainfield, where he has a "Nice yard—except where he needs grass." She claimed (p. 5), "Absolutely," it was a half bag, not a full one. (Tr. 258–261.)

The next morning the Company held a second factfinding meeting with Notter, with Walters as her witness. She stated (G.C. Exh. 6, 1) that she had returned the bag, "Just like I got it." When told the bag in her vehicle had been a full one, she again (at 4) denied it. Walters spoke up and said, "I didn't see anything." At the end of the meeting (at 7), Notter and Walter went with the Company to the McDuffee home. (Tr. 261–262.)

Later that morning the Company held a factfinding meeting with Walters, with Notter as his witness. When asked whether he wanted to change his answer about not seeing anything, Walters answered (G.C. Exh. 7, 1), "I said I don't know." He then claimed that he did not know if he did or did not carry out grass seed, and that he did not know if he had any grass seed on his personal truck, but "Possibly I might have." When later asked (8–9), "Assuming bag in truck, you don't know how it got there?" he answered, "I put it there unless you did." (Tr. 266–268.)

Thus, neither Walters nor Notter admitted in the factfinding meetings having taken any grass seed for their personal use. They claimed in the meetings that the Company permitted the taking of company property for personal use.

The Company's investigation revealed that Walters had been seen taking out grass seed that Friday morning, that Rick McDuffee was no longer living in the house on Kimberly, and that there were no bare spots in the yard needing grass seed (Tr. 358–359, 367, 369).

At the trial Walters admitted that Notter had asked him to get a bag of grass seed for her, that he asked an employee to add a bag of grass to the employee's issue ticket (making a total of three 25-lb. bags), and that he carried a full bag to Notter's company truck, where he saw that another employee had already placed a partial bag that was left over from the day before. Walters asked if Notter preferred the full bag or the partial bag. She said the full bag, which he placed in her vehicle. He placed the partial bag in the dog box on his pickup truck because it had been raining all week. (Tr. 220–223, 343; R. Exh. 4.)

Notter admitted at the trial that she had previously told the other employee she needed some grass seed and that she and her husband had used some of the seed that weekend before the factfinding meetings. She admitted that she got the full bag of grass seed, only part of which she had planned to give to the customer to whom she previously had offered seed the next time she got some. The customer and his wife were then getting a divorce, and he was no longer living in the house but was maintaining the property. (Tr. 83, 119, 125.)

The Company discharged both employees for "unauthorized possession of company property" (G.C. Exh. 13, 6–7).

2. Contentions of the parties

The General Counsel contends in his brief (at 14–15) that the evidence clearly shows that the real reason for the discharges was not the taking of the grass seed, but the union activity of Walters' meeting 2 weeks earlier "with the employees about forming a union committee, and Notter's volunteering to serve on that committee."

This is a reference to Walters' meeting with the Danville union members to get two employees to volunteer to serve with him on a joint company/union alternative conflict resolution committee under article 50 of the collective-bargaining agreement (R. Exh. 2 p. 42). Notter and another union member finally agreed to serve with Walters on the committee. (Tr. 73–76, 168, 189–190, 195–198.)

On May 28, the day before Walters was discharged, he delivered to the Company a letter addressed to Director Employee Relations Hobson (G.C. Exh. 3), announcing that the Union had appointed Notter and the other employee to serve with him on the joint committee and requesting a meeting regarding "alleged violation of Weingarten rights, and intimidating management practices" at Danville (Tr. 201–203).

The General Counsel has failed to show that the Company was even in part motivated by this union activity. Hobson, who made the discharge decision, had proposed the article 50 provision when it was included in the collective-bargaining agreement (Tr. 240, 366, 371).

The General Counsel also contends (at 17) that "[f]urther evidence of a prima facie case [under *Wright Line*, 251 NLRB 1083, 1089 (1980)] may be found in the reason for Walters' and Notter's discharge. They were discharged for conduct, namely taking company property for personal use, that management had previously allowed to occur on a regular basis."

This contention refers to evidence that employees had taken for their personal use such company property as grass seed, weed killer, flashlight batteries, etc., but *with permission of management* (Tr. 62–64, 92–95, 114, 130–131, 157–159, 205–206, 364). The evidence is clear that although Walters and Notter may have believed that permission was not required, they showed no confidence in such a believe in the factfinding meetings when they failed to admit what had happened.

Particularly in view of undisputed evidence that Walters and Notter took the bags of grass seed *without permission of management*, I agree with the Company and find that the General Counsel has failed to show that their union activity was a motivating factor in the Company's decision to discharge them.

I therefore find that the allegation that the Company discriminatorily discharged Walters and Notter in violation of Section 8(a)(3) and (1) must be dismissed.

CONCLUSIONS OF LAW

1. By coercively threatening employees with loss or transfer of jobs if they revealed to the union steward the Company's meetings with them and the information it gave them about their jobs, enabling it to further downsize the bargaining unit and contract out more work, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The General Counsel has failed to prove that the Company discriminatorily discharged Walters and Notter in violation of Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Indiana Gas Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss or transfer of jobs if they reveal to the union steward or representative information the Company gives them about their jobs, enabling it to further downsize the bargaining unit and contract out more work.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Danville, Indiana copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."